No. 04-1065

Supreme Court, U.S.
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In The
Supreme Court of the United States

INTERCONTINENTAL ELECTRONICS, S.p.A., a foreign corporation,

Petitioner,

v.

AMERICAN KEYBOARD PRODUCTS, INC., a Michigan corporation,

ROBERT C. KOTZ and GREGORY WYSOCKI, jointly and severally,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the lack of merit and significance of Petitioner's Petition for Writ of Certiorari:

Did the Michigan Supreme Court correctly deny leave to appeal the decision of the Michigan Court of Appeals, where it was determined that Respondent complied with all necessary procedural requirements in serving its pleadings upon Petitioner and Petitioner had actual notice of all proceedings undertaken in the trial court?

LIST OF PARTIES

Petitioner Below:

Intercontinental Electronics, S.p.A.

Respondents Below:

American Keyboard Products, Inc.
Robert C. Kotz
Gregory Wysocki

CORPORATE DISCLOSURE STATEMENT

Respondents, American Keyboard Products, Inc., Robert C. Kotz and Gregory Wysocki, by their undersigned attorneys, hereby furnish the following disclosure statement:

1. Full Name of Party Represented: American Keyboard Products, Inc.

2. Is Party a corporation? Yes

    a. Parent corporation: None

    b. List of corporate stockholders that are publicly held companies owning 10% or more of the stock of represented party: None

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Respondents, American Keyboard Products, Inc., Robert C. Kotz and Gregory Wysocki, respectfully request that this Court deny Petitioner Intercontinental Electronics, S.p.A.'s Petition for a Writ of Certiorari ("Petition"), seeking review of the October 25, 2004 order of the Michigan Supreme Court declining to review the March 18, 2004 unpublished opinion of the Michigan Court of Appeals. (Pet. App., p. 1a-2a.)

JURISDICTIONAL STATEMENT

Contrary to Petitioner's assertion in its Petition, jurisdiction is not conferred to this Court by way of 28 U.S.C. § 1257. It is well settled the United States Supreme Court will not consider an alleged federal claim "unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). Petitioner bears the burden of demonstrating that the federal issue was properly presented to the lower court and "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S., at 86, citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987).

Here, Petitioner claims that federal due process considerations warrant review of the rulings of the Michigan appellate courts, and it cites to the Fourteenth Amendment of the United States Constitution in its Petition. However, a review of the pleadings presented to the lower courts, as well as the opinion of the Michigan

Court of Appeals, reveals that no federal question was ever articulated to the trial court or the Michigan appellate courts and not a single reference was made to the Fourteenth Amendment. Instead, the lower court pleadings made vague references to "due process" considerations and relied almost exclusively on case law based upon Michigan's due process clause found at Article I, § 17 of the Michigan Constitution. Further, the opinion of the Michigan Court of Appeals makes no reference to federal due process concerns.

Moreover, Petitioner's vague "due process" reference before the Court of Appeals was not preserved for appellate review. As to Petitioner's claim its due process rights were violated by way of service of Respondents' counterclaim in conformity with the Michigan Court Rules, that issue was never raised either before the trial court, the Michigan Court of Appeals or the Michigan Supreme Court. As to Petitioner's second issue, that it was denied due process because it did not receive "reasonable" notice of the hearing on the default judgment request, this issue was also not preserved below. As noted by the Michigan Court of Appeals in its March 18, 2004 unpublished opinion, "this issue was not preserved for appellate review because Plaintiff did not raise it in the trial court." (Pet. App., p. 5a.)

This Court has previously ruled that generalized vague references to constitutional protections which fail to clearly cite to the United States Constitution, and which could just as easily refer to state constitutional guarantees, are insufficient to present a federal question under 28 U.S.C. § 1257. See, e.g., *Howell v. Mississippi*, ___ U.S. ___, 125 S.Ct. 856, 859, ___ L.Ed.2d ____ (2005); *Adams v.*

Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997); *New York Central R. Co. v. New York*, 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 (1897). The Petition presented to this Court fails to demonstrate that any federal question was actually raised, passed on, or preserved for appellate review. Accordingly, no jurisdictional basis exists under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

1. Nature of the Action

This is a squabble between businessmen over money. Intercontinental Electronics, S.p.A. ("Intercontinental") filed a complaint claiming American Keyboard Products, Inc. ("AKP"), Robert C. Kotz ("Kotz") and Gregory Wysocki ("Wysocki") (collectively the "AKP Parties"), jointly and severally, owed it $26,400. The AKP Parties counterclaimed for damages they incurred by virtue of Intercontinental's intentional destruction of AKP. That is, after misrepresenting its intent to foster AKP's exclusive right to market Intercontinental's products in the United States and Canada, Intercontinental opened a directly competing business, stole AKP's principal employees, misappropriated AKP's business, and intentionally put AKP out of business after AKP expended a substantial amount of money to develop a distribution system.

Intercontinental answered AKP's counterclaim, but soon thereafter abandoned the action. Intercontinental permitted its counsel to withdraw and failed to appear for a status conference, a default for which the Circuit Court dismissed Intercontinental's complaint. Intercontinental

continued to ignore the litigation, despite numerous notices of various events. As a result of Intercontinental's decision to ignore the case, the Circuit Court ultimately entered a Default against Intercontinental on AKP's counterclaim and, seven months later, entered a Default Judgment.

After the Default Judgment was entered, Intercontinental filed a motion to set it aside and claimed (for the first time) its insurer, EULER- Sociata Italiana Assicurazione Crediti S.p.A. ("EULER") had already paid in full AKP's alleged debt to Intercontinental; EULER was really the Plaintiff; and that Intercontinental was not responsible for anything that occurred in the litigation because EULER's attorney was supposed to take care of it. (Pet. App., p. 28a-42a.) The Circuit Court did not believe Intercontinental's story. It found Intercontinental had properly received notice of the default and did not establish good cause to set aside the Default Judgment, and entered its June 12, 2002 Order denying Intercontinental's Motion to Set Aside Default Judgment.

2. The Proceedings Before The Trial Court, and Events Leading to the Default Judgment against Intercontinental

In July 2001, Attorney Richard G. Roosen filed a Complaint and Amended Complaint on behalf of Intercontinental. Intercontinental was the sole Plaintiff. An "Affidavit of Account" was sworn to and executed by Intercontinental's counsel, Roosen, on behalf of "Intercontinental Electronics, S.p.A." as its "Agent & Attorney in Fact," attesting to the amount claimed owed by AKP.

After commencing its lawsuit, Intercontinental proceeded like any litigant and, among other things, filed Plaintiff's Witness List on December 13, 2000; served Plaintiff's Interrogatories to Defendant on or about January 10, 2001; and, approved as to form the First Stipulated Order Modifying Scheduling Order on or about January 10, 2001.

After investigating the underlying facts, the AKP Parties filed and served upon Intercontinental's counsel their Motion to Extend Dates and Allow Defendants to File Counterclaim ("Counterclaim Motion") on March 1, 2001. A little over a month later, Intercontinental, through its attorney, Roosen, stipulated to the portion of the AKP Counterclaim Motion requesting an Order Modifying the Scheduling Order. Intercontinental, however, did not then or at any other time file a response to AKP's Counterclaim Motion with respect to the issue of AKP filing its counterclaims.

During the period of time between when Intercontinental's counsel learned the AKP Parties intended to pursue counterclaims and the actual filing of the Countercomplaint, Roosen was communicating with Intercontinental about the possible counterclaims and was trying to get direction from Intercontinental how he, on behalf of Intercontinental, should proceed. Among other things:

- On March 3, 2001, EULER electronically mailed to Intercontinental an attorney letter about the counterclaim to which Intercontinental did not respond. *See* EULER March 31, 2002 facsimile cover letter, in which EULER writes "the attorney letter of February 20th . . . was E-mailed to you on March 3. . . ." (Pet. App., p. 56a.)

- On March 31, 2001, EULER reminded Intercontinental it has not responded to the February 20 Roosen letter:

  > We have no record of any response to attorney's letter of February 20th which was E-mailed to you on March 3rd. The attorney requested an immediate response from your insured at that time. It now appears that if the debtor prevails and files a counterclaim the attorney will request a retainer in advance to defend the counterclaim against which he will bill on an hourly basis. (Pet. App., p. 56a.)

- Intercontinental admits it was informed that "AKP was considering filing a counterclaim and that KKG&R would defend the counterclaim and 'bill on an hourly basis' after receiving a 'retainer.'"

Following the April 11, 2001 hearing on the remaining issue presented by the Counterclaim Motion, the Court entered its Order Allowing the Defendants to File Counterclaim dated April 11, 2001 ("Counterclaim Order"), which the AKP Parties served upon Intercontinental's counsel. Pursuant thereto, on April 25, 2001, the AKP Parties filed and served Intercontinental's counsel, Roosen, their Countercomplaint. The Counterclaim alleged fraud, fraudulent inducement, tortious interference with business relationships, business defamation, breach of fiduciary duty, and silent fraud. The Counterclaim also sought exemplary damages based upon Intercontinental's willful, wanton, intentional and malicious conduct, which resulted in humiliation, outrage, business defamation and

indignation in complete disregard for the rights of the AKP shareholders, Kotz and Wysocki.

On May 11, 2001, the AKP Parties filed and served upon Intercontinental's counsel, Roosen, a Notice of Taking Deposition Duces Tecum of a Corporate Designee of Intercontinental. In response thereto, Intercontinental, through its counsel, Roosen, filed Intercontinental's Objection to Deposition Notice Duces Tecum of Corporate Designee of Intercontinental Electronics, S.p.A. and Motion for Protective Order ("Objection and Motion"), which it filed on June 5, 2001, but did not notice for hearing until July 25, 2001. Therein, Intercontinental opined:

> 2. That your Plaintiff/Counter-Defendant is an Italian company with its principal corporate offices outside of the continental United States.
>
> * * *
>
> 5. That pursuant to MCR 2.302(C) and MCR 2.302(B)(1), your Plaintiff/Counter-Defendants objects to said Notice of Taking Deposition Duces Tecum of a Corporation Designee of Intercontinental Electronics, S.p.A. for the reason that:
>
> A. Less burdensome means of discovery have not been utilized by Defendants/ Counter-Plaintiffs in this action that is less expensive and/or burdensome.
>
> B. Said examination is scheduled in a manner that is reasonably believed to unduly annoy or oppress your Plaintiff/ Counter-Defendant in bad faith.

In its Objection and Motion, Intercontinental did not claim Intercontinental's corporate designee was not subject to the jurisdiction of the Oakland County Circuit Court, nor that Intercontinental was not really the Plaintiff.

On June 4, 2001, Intercontinental, through its counsel, filed its Answer to Counter Claim and Affirmative Defenses. (Pet. App., p. 154a-159a.) Intercontinental did not assert as an affirmative defense lack of jurisdiction, failure of service of process or that Intercontinental was not really the Plaintiff.

After Roosen had an opportunity to discuss the Counterclaim with Intercontinental, Roosen told the AKP Parties' counsel "that Intercontinental was not afraid to take a judgment on the counterclaim because it kept all its assets offshore, and out of the reach of AKP," and further, that "Intercontinental considered itself to be 'judgment-proof.'" (Resp. App., p. 1a-3a.) Later, Roosen offered to settle the entire case on the basis that "Intercontinental would dismiss its complaint if AKP would dismiss its counterclaim." (Resp. App., p. 1a-3a.)

On June 20, 2001, Intercontinental's counsel filed Plaintiff's Motion to Withdraw as Counsel, in which Roosen wrote, "Counsel for Plaintiff has repeatedly attempted to obtain Plaintiff's cooperation in representing Plaintiff's legal interest herein," and "has been unable to obtain Plaintiff's cooperation . . . ". Intercontinental's counsel served the Motion to Withdraw on Intercontinental. Intercontinental does not dispute it received its counsel's Motion to Withdraw and did not object thereto.

At the July 18, 2001 hearing on the Motion to Withdraw, Intercontinental's counsel explained to the Court:

> The attorney/client relationship has broken down. As you remember, my client is an Italian business. There are no offices in the U.S. nor are there any salespersons in the U.S. All communications that we've been having with our client are via e-mail. We have been e-mailing our client with statuses, we've been giving them suggestions, and legal counsel which they have promptly either ignoring or refusing and until the point that they're not even communicating with us any more. (Pet. App., p. 150a.)

On July 18, 2001, the Circuit Court granted Roosen's Motion to Withdraw. (Pet. App., p. 144a-146a.) That order provides further:

> IT IS FURTHER ORDERED that Richard G. Roosen shall give Intercontinental Electronics, S.p.A. immediate notice of this Order and shall immediately file proof of service of the notice with the Court and serve same on defendants/ Counter-Plaintiffs;
>
> IT IS FURTHER ORDERED that Intercontinental Electronics, S.p.A. shall have 30 days from the date of this Order to have substitute counsel file an appearance on its behalf;
>
> IT IS FURTHER ORDERED that should Intercontinental Electronics, S.p.A. fail to have an appearance entered on its behalf within 30 days from the date this Order, its Complaint may be dismissed with prejudice and default judgment may be entered against Intercontinental on Defendants/Counter-Plaintiffs' Counter-Complaint;

Roosen served the Withdrawal Order on Intercontinental.

By a July 20, 2001 mailing, the Circuit Court served upon Intercontinental directly a Notice of the August 28, 2001 Pre-Trial Conference. Intercontinental received this Notice, which is indicated in the affidavit filed by Intercontinental in support of its motion to set aside the default judgment. (Pet. App., p. 70a.)

Consistent with Roosen's earlier expression of Intercontinental's lack of concern regarding the Counterclaim and judgment being rendered against it, Intercontinental did not secure new counsel and did not attend the August 28 Pre-Trial Conference. When Intercontinental failed to respond, object or appear at the conference, the Circuit Court entered an Order of Default against Intercontinental (Pet. App., p. 140a-141a.) and an Order Dismissing Intercontinental's Complaint (Pet. App., p. 142a-143a.) In the Default, the Circuit Court reserved the issue of damages for a later date and ordered AKP to serve Intercontinental with the Default and Dismissal Order by mailing them to Intercontinental's principal office. AKP did so and Intercontinental admits receiving the Default and Dismissal Order on September 14, 2001, and again on October 16, 2001. (Pet. App., p. 46a-47a.)

Intercontinental did nothing in response to receiving the Default. Months went by. On May 1, 2002, the AKP Parties filed their Motion for Entry of Judgment Amount. (Pet. App., p. 122a-139a.) On the same day, AKP served that motion and notice of hearing thereon on Intercontinental at the same address and in the same manner as everything else had been served upon Intercontinental to date. AKP scheduled the hearing for May 15, 2002, even though the Michigan Court Rules permitted AKP to schedule the hearing for May 8, 2002.

Intercontinental received the Motion for Entry of Judgment Amount in Italy, not later than May 14, 2002, and "immediately" faxed it to its "U.S. counsel," Nicola Fiordalisi in Chicago, Illinois. (Pet. App., p. 47a.) Intercontinental does not claim, nor can it, that its U.S. counsel called or otherwise contacted AKP, its counsel or the Circuit Court upon receipt of the Motion for Entry of Judgment.

At the May 15, 2002 hearing on the AKP Motion, the Court pushed back the hearing from 8:30 a.m. to about 10:00 a.m. to provide Intercontinental additional time to show up. Intercontinental and its "U.S. counsel" knew this hearing was scheduled at least by the previous day, but did not contact AKP's counsel or the court. After receiving argument and testimony, the Circuit Court granted AKP's motion. (Pet. App., p. 109a-110a.)

By Order of Judgment against Intercontinental dated May 15, 2002, the lower court fixed the amount of AKP's damages and entered judgments in the amounts of $2,352,012.97 against Intercontinental in favor of AKP; $100,000 against Intercontinental in favor of Wysocki; and $100,000 against Intercontinental in favor of Kotz. AKP served the Default Judgment on Intercontinental at the same address and in the same manner. Intercontinental received the Default Judgment on or before May 20, 2002, only four days after service.

On June 5, 2002, Intercontinental's belatedly hired new local counsel filed Plaintiff's Motion to Set Aside Default Judgment, in which it proffered the story – previously untold – that EULER paid Intercontinental the amount Intercontinental claimed was due it from AKP, and that EULER (not Intercontinental) brought this case

on its own behalf under a right of subrogation. Intercontinental opined further that it reasonably relied upon EULER's legal opinion on Michigan law and procedure to ignore the Default Order.

In addition to lacking credibility, Intercontinental's story did not establish good cause for setting aside the Default Judgment, under the Michigan Court Rules. Accordingly, the Circuit Court denied Petitioner's Motion to Set Aside Default Judgment. (Pet. App., p. 14a-27a.) The Court entered its June 12, 2002 Order Denying Motion to Set Aside Default Judgment, from which Intercontinental appealed. (Pet. App., p. 13a.)

3. The Proceedings Before the Michigan Court of Appeals, the Michigan Supreme Court, and the Corte d'Appello di Bologna

On July 7, 2002, Intercontinental filed a claim of appeal with the Michigan Court of Appeals. As reflected in the Michigan Court of Appeals' opinion issued March 18, 2004, the Court of Appeals determined the trial court did not err in refusing to set aside the default judgment. In its unpublished opinion, the Court of Appeals pointed out that many of the issues raised by Intercontinental in its briefing had not been argued before the trial court, and therefore, had not been preserved for appellate review. This finding was made expressly with regard to Intercontinental's argument it was denied due process because it did not receive notice of AKP's motion to enter a default judgment until one day prior to hearing on the motion. However, the Court of Appeals then went on to consider the issue on its merits, finding that because Intercontinental was "properly served under the court rules, received actual notice of the hearing, and knew that a default had been entered

against it, plaintiff's due process rights were not violated." (Pet. App., p. 5a.)

As to Intercontinental's claim it was denied due process because it was not served with AKP's counterclaim, this issue was not raised before the trial court or the Court of Appeals as a due process violation. Instead, Intercontinental argued it was not subject to the trial court's jurisdiction because it was not the real party in interest, and thus, service of the counterclaim could not have been made by service upon Roosen as Intercontinental's counsel as permitted under the Michigan Court Rules. The Court of Appeals rejected this argument as well:

> Plaintiff did not raise the issue of lack of personal jurisdiction either in its answer to the countercomplaint or in its list of affirmative defenses. While plaintiff alleges that it was not "advised in any meaningful form that defendants had filed a counterclaim," the proof of service indicated that the counterclaim was properly served on plaintiff's attorney, and the affidavit by one of plaintiff's officers indicated that plaintiff received notice on March 31, 2001, that defendant was considering filing a counterclaim. If plaintiff's attorney of record improperly represented himself as the attorney for plaintiff, plaintiff's remedy lies in a suit against its counsel. (Pet. App., p. 7a.)

Notably, Intercontinental has heeded this advice from the Court of Appeals and has filed three lawsuits in an effort to recover the damages awarded by the trial court to Respondents. The first two lawsuits are presently pending in the United States District Court for the Eastern District of Michigan, one having been filed against EULER and the

other against Roosen and his law firm. The third lawsuit filed by Petitioner is pending in Italy against EULER.

On October 25, 2004, the Michigan Supreme Court denied Intercontinental's application for leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court." (Pet. App., p. 1a-2a.)

Once the automatic stay on enforcing judgments imposed by the Michigan Court Rules ended, the AKP Parties began an *exequatur* proceeding in the Bologna Court of Appeals for recognition and enforcement of their judgment in Italy. Intercontinental argued to the Bologna court that due to its appeal, the judgment was not final, and therefore failed to meet one of the criteria set forth in the Italian code for recognizing judgments of foreign states. Respondents submit that this is Petitioner's motivation behind its Petition to this Court and not concerns over due process or the lack thereof.

REASONS FOR DENYING THE PETITION

Three reasons require the Court to deny the Petitioner's request for review of the Michigan Supreme Court's order declining to review the Michigan Court of Appeals' unpublished opinion issued March 18, 2004. First, Petitioner has failed to establish the existence of a federal question, and thus cannot satisfy the jurisdictional requirements of 28 U.S.C. § 1257. Second, both the trial court and the Michigan Court of Appeals correctly determined Respondents were entitled to the entry of a default judgment against Intercontinental. Third, the issue presented is not one which warrants this Court's intervention,

given its unpublished and therefore, non-precedential nature.

1. No Federal Question Was Presented to the Lower Court, and Therefore Petitioner Has Failed to Establish Jurisdiction Pursuant to 28 U.S.C. § 1257.

The jurisdictional requirements of 28 U.S.C. § 1257 are clear. The United States Supreme Court will not review a petitioner's federal claim if it was not presented to, or addressed by, the state court that rendered the decision for which review is sought. *See, Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997); *Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983).

Here, a review of Petitioner's trial court pleadings, as well as the ruling of the Michigan Court of Appeals readily confirms that no federal question was preserved for appellate review. At no point within Petitioner's trial court motion to set aside the default judgment did Petitioner ever mention the Fourteenth Amendment of the United States Constitution or make any argument based upon Federal jurisprudence. (Pet. App., p. 28a-108a.) Instead, Petitioner's motion to set aside the default judgment was based solely upon MCR 2.603(D)(1), the provision of the Michigan Court Rules which addresses setting aside a default or default judgment. (Pet. App., p. 184a-187a.) Petitioner's trial court briefing was limited to the issues of good cause and the existence of a meritorious defense, as must generally be shown under Michigan law in order to set aside a default or default judgment.

This failure to raise due process concerns before the trial court was expressly recognized in the opinion issued by the Michigan Court of Appeals. (Pet. App., p. 3a-13a.) This defect is fatal to Intercontinental's Petition.

2. The Trial Court and the Michigan Court of Appeals Correctly Determined Respondents Were Entitled to the Entry of a Default Judgment against Intercontinental.

In addition to lacking jurisdiction, Intercontinental's Petition lacks merit. Intercontinental's arguments can be reduced to one simple assertion – "due process" was denied Petitioner despite Respondents' compliance with all requirements regarding service of process, and despite Intercontinental's actual notice of proceedings pending against it.

Intercontinental first contends the lower courts failed to make a factual determination as to whether they were the real party in interest, which according to Intercontinental, it is not. Intercontinental's theory ignores both fact and law. As a factual issue, the determination of whether Intercontinental was the real party in interest does not present a federal question for review by this Court. As stated in Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As evidence supporting its determination, the trial court and the appellate court had before it abundant evidence that Intercontinental was in fact, the real party in interest, including perhaps most importantly, Intercontinental's admission it knew a lawsuit had been filed in its name by attorney Richard Roosen, with its consent! (Pet. App., p. 44a-45a.) Intercontinental has never explained how it could agree to be

named as a plaintiff in a lawsuit by counsel representing its interests, yet not really be the "real party in interest."

Further, Intercontinental's claim ignores the fact that MCR 2.201(B), which governed the action filed by Richard Roosen, requires complaints to be filed in the name of the real party in interest. (Pet. App., p. 178a-183a.) Compliance with the Michigan Court Rules is required and parties are charged with having knowledge of the Michigan Court Rules. *See, e.g., Staff v. Curtis C. Marder, M.D., P.C.*, 242 Mich. App. 521, 619 N.W.2d 57 (2000); *St. Paul Fire & Marine Ins. Co. v. CEI Florida, Inc.*, 152 FRD 95, 97 (ED Mich, 1993). Thus, the only way Intercontinental's argument can succeed is by Intercontinental admitting that it permitted flagrant non-compliance with the Michigan Court Rules when it suited its interests. By permitting a lawsuit to be prosecuted in its name, Intercontinental subjected itself to the Michigan Court Rules. Those rules, specifically MCR 2.107(B)(1), permit Intercontinental to be served with a counterclaim by mailing it to Intercontinental's attorney of record. (Pet. App., p. 174a-177a.)

Indeed, service of all judicial documents on Intercontinental met all applicable legal standards. Intercontinental complains about service of the motion for entry of default judgment. Yet, service of this document by mail was consistent with the manner and quality of service prescribed by the Michigan Court Rules and the *Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at the Hague November 15, 1965* ("Hague Convention"). (Pet. App., p. 188a-271a.) Under Article 10(a) of the Hague Convention, unless a signatory country objects, service of judicial documents may be made "by postal channels, directly to persons abroad." (Pet. App., p. 195a-196a.) Italy has not objected to this provision of

the Hague Convention, and thus, service of the motion for entry of default judgment and the notice of hearing thereon by mailing them to Intercontinental in Italy satisfied the manner of service required by the Hague Convention. Similarly, sending subsequent judicial documents by mail meets the requirements of the Michigan Court Rules. See MCR 2.107(C) (" . . . Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings . . . ") (Pet. App., p. 175a.) Simply put, Intercontinental was properly served. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988) ("The legal sufficiency of a formal delivery of documents must be measured against some standard. The Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state.")

Moreover, consistent with its failure to preserve any federal appellate issue, Intercontinental never contended before the trial court that service of the motion was insufficient under the Hague Convention. Instead, it was Respondents who raised the issue, in order to assure the trial court that all service requirements had been satisfied.

3. The Ruling that Petitioner Seeks this Court to Review Is Unpublished and Therefore Has No Precedential Value.

While Intercontinental's Petition is taken from an order of the Michigan Supreme Court that declines to grant review, the substantive opinion from which Petitioner seeks relief is the March 18, 2004 opinion of the Michigan Court of Appeals. That opinion is unpublished, which pursuant to MCR 7.215(C)(1) "is not precedentially

binding under the rule of stare decisis." (Resp. App., p. 5a.) See also, *Higgins Lake Property Owners Ass'n v. Gerrish Township*, 255 Mich. App. 83, 662 N.W.2d 387 (2003).

Given its lack of precedence, there is no reason for this Court to review the Court of Appeals opinion, or the Michigan Supreme Court order declining review. The ruling will not serve to change or otherwise have a determinative impact on Michigan or Federal jurisprudence and further, will not have any impact upon future cases that raise similar issues. In short, this ruling will impact no one but the parties. Given this Court's need to limit its review to cases that present legal issues of great significance, Petitioner fails to demonstrate how review of this matter will have any impact on any future rulings of any court in any case.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

INTERCONTINENTAL ELECTRONICS, S.P.A.,
a foreign corporation,

Plaintiff/Counter-Defendant,

vs.

AMERICAN KEYBOARD PRODUCTS, INC,
a Michigan corporation, ROBERT C. KOTZ and
GREGORY WYSOCKI, Jointly and Severally,

Defendants/Counter-Plaintiffs.

_____/

KOTZ, SANGSTER, WYSOCKI AND BERG, P.C.
By: Christopher A. Cornwall (P42721)
Attorneys for Third-Party Defendants
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(313) 259-8300

_____/

AFFIDAVIT OF CHRISTOPHER A. CORNWALL

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

1. I have personal, first-hand knowledge of the facts stated in this affidavit, and if called as a witness at trial, could testify competently about them.

2. I am one of the attorneys who represent American Keyboard Products, Inc. ("AKP") in the above-captioned matter.

3. During the course of litigation, counsel for Intercontinental Electronics, S.P.A. ("intercontinental"), Richard Ronson, and I had many conversations about the litigants and about the merits of their claims.

4. During one conversation, Mr. Roosen told me that Intercontinental was not afraid to take a judgment on the counterclaim because it kept all its assets offshore, and out of the reach of AKP. He said Intercontinental considered itself to be "judgment-proof."

5. During yet another conversation, Mr. Roosen told me Intercontinental would, dismiss its complaint if AKP would dismiss its counterclaim.

6. During another conversation, which took place at the hearing on his motion to withdraw as counsel, Mr. Roosen told me that Intercontinental was his client and that all future notices should be sent to its office on Via Belvedere Fogliense in Mondaino, Italy.

7. In none of our conversations during the year in which we litigated this matter did Mr. Roosen ever imply that he represented a party that was suing as subrogee, or that Intercontinental had been paid by its insurer, due to a unique feature of Italian law or otherwise.

8. Intercontinental never disclosed a subrogation agreement and never disclosed the fact it had been paid during any of the discovery that had been conducted during the course of litigation.

FURTHER AFFIANT SAYETH NOT.

/s/ Christopher A. Cornwall
CHRISTOPHER A. CORNWALL

Subscribed and sworn to before
me this 7th day of June, 2002.

/s/ Margaret Moye
MARGARET MOYE, Notary Public
Wayne County, Michigan
My Commission Expires: 07/26/05

MICHIGAN RULES OF COURT

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court.

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes a provision of a constitution, statute, ordinance, or court rule;

(3) alters or modifies an existing rule of law or extends it to a new factual context;

(4) reaffirms a principle of law not applied in a recently reported decision;

(5) involves a legal issue of continuing public interest;

(6) criticizes existing law;

(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

(D) Requesting Publication.

(1) Any party may request publication of an authored or per curiam opinion not designated for publication by

(a) filing with the clerk 4 copies of a letter stating why the opinion should be published, and

(b) mailing a copy to each party to the appeal not joining in the request, and to the clerk of the Supreme Court.

Such a request must be filed within 21 days after release of the unpublished opinion or, if a timely motion for rehearing is filed, within 21 days after the denial of the motion.

(2) Any party served with a copy of the request may file a response within 14 days in the same manner as provided in subrule (D)(1).

(3) Promptly after the expiration of the time provided in subrule (D)(2), the clerk shall submit the request, and any response that has been received, to the panel that filed the opinion. Within 21 days after submission of the request, the panel shall decide whether to direct that the opinion be published. The opinion shall be published only if the panel unanimously so directs. Failure of the panel to act within 21 days shall be treated as a denial of the request.

(4) The Court of Appeals shall not direct publication if the Supreme Court has denied an application for leave to appeal under MCR 7.302.

(E) Judgment.

(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

(2) The clerk shall send a certified copy of the opinion or order, with the date of filing stamped on it, to each party and, in an appeal, to the court or tribunal from which the appeal was received. In criminal cases, the clerk shall provide an additional copy of any opinion or order disposing of an appeal or of any order denying leave to

appeal to the defendant's lawyer, which the lawyer must promptly send to the defendant. An opinion or order is notice of the entry of judgment of the Court of Appeals.

(F) Execution and Enforcement.

(1) *Routine Issuance.* Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

> (a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court;
>
> (b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[I] or by the Supreme Court clerk under MCR 7.311[B]) with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) *Exceptional Issuance.* The court may order that a judgment described in subrule (E) has immediate effect. The order does not prevent the filing of a motion for rehearing, but the filing of the motion does not stay execution or enforcement.

(G) Entry, Issuance, Execution on, and Enforcement of All Other Orders. An order other than one described in subrule (E) is entered on the date of filing. The clerk must promptly send a certified copy to each party and to the trial court or tribunal. Unless otherwise stated, an order is effective on the date it is entered.

(H) Certain Dispositive Orders and Opinions in Criminal Cases; Expedited Notice to Prosecutor. In a criminal case, if the prosecuting attorney files a notice of a victim's request for information and proof that copies of the notice were served on the other parties to the appeal, then, coincident with issuing an order or opinion that reverses a conviction, vacates a sentence, remands a case to the trial court for a new trial, or denies the prosecuting attorney's appeal, the clerk of the court must electronically transmit a copy of the order or opinion to the prosecuting attorney at a facsimile number or electronic mail address provided by the prosecuting attorney in the notice.

(I) Reconsideration.

(1) A motion for reconsideration may be filed within 21 days after the date of the order or the date stamped on an opinion. The motion shall include all facts, arguments, and citations to authorities in a single document and shall not exceed 10 double-spaced pages. A copy of the order or opinion of which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3).

(2) A party may answer a motion for reconsideration within 14 days after the motion is served on the party. An answer to a motion for reconsideration shall be a single document and shall not exceed 7 double-spaced pages.

(3) The clerk will not accept for filing a motion for reconsideration of an order denying a motion for reconsideration.

(4) The clerk will not accept for filing a late motion for reconsideration.

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) *Conflicting Opinion.* A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) *Convening of Special Panel.*

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. No poll shall be conducted and a special panel shall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) Order. Immediately following the poll, an order reflecting the result must be entered. The chief clerk of the Court of Appeals must provide a copy of the order to the Clerk of the Supreme Court. The order must be published in the official reports of opinions of the Court of Appeals.

(4) *Composition of Panel.* A special panel convened pursuant to this rule consists of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) *Consideration of Case by Panel.* An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel shall return to the original panel for further consideration any remaining, unresolved issues, as the case may require.

(6) *Decision.* The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

(7) *Reconsideration; Appeal.* There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at

bar, the time limits for moving for reconsideration or for filing an application for leave to appeal to the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits shall run from the date of the original panel's decision, after return from the special panel. If a motion for reconsideration is filed, it shall be submitted to the special panel, which, if appropriate, may refer some or all of the issues presented to the original panel.